Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1254

In the Matter of

GAILLARD T. HUNT,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

GAILLARD T. HUNT
2231 California Street, N.W.
Washington, D.C. 20008
Tel.: 234-0950

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GAILLARD T. HUNT,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

GAILLARD T. HUNT petitions this honorable Court for the writ of certiorari to review the judgment of the District of Columbia Court of Appeals affirming petitioner's conviction of contempt of court.

OPINIONS BELOW

The order of the Superior Court of the District of Columbia finding petitioner in contempt is in the Appendix at page App. 7. The November 4, 1975, order denying reconsideration is at page App. 14. The D.C. Court of Appeals opinion dated December 10, 1976, affirming these actions, appears at 367 A.2d 155 and page App. 15.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court rests on 28 U.S.C. 1257. On February 9, 1977, the D.C. Court of Appeals denied a timely petition for rehearing (App. 21). This petition is filed within thirty days of that date.

QUESTIONS PRESENTED

Is the summary Rule 42(a) procedure adequate to hold a lawyer in criminal contempt for being seven minutes late to the start of a trial when he insists his lateness is wholly accidental and that he made great efforts to get to court on time?

On this record can this petitioner's conviction of criminal contempt stand?

STATUTES AND RULES INVOLVED

D.C. Superior Court Criminal Rule 42 is identical with Federal Criminal Rule 42 except for a reference to the Corporation Counsel of D.C., not here relevant. App. 23.

On April 18, 1973, the local and federal courts in the

District of Columbia reached an agreement entitled "Procedures for Avoiding and Resolving Conflicts in Engagements of Counsel to Appear before the Courts in the District of Columbia." This is now embodied in the local rules of the U.S. District Court for the District of Columbia, Rule 3-11, and in Civil Rule 104 and Criminal Rule 57 of the D.C. Superior Court. This agreement followed the incident described in *In re Nesbitt*, 313 A.2d 576 (D.C.C.A., 1973), where the same judge involved in this petition, Hon. John R. Hess, disputed with another judge with conflicting orders, messages sent through marshals, etc., about where Attorney Nesbitt should appear. The entire rule is set out in the Appendix (App. 24) only to assure the Court there is nothing in the rule supporting this contempt conviction.[1]

STATEMENT OF CASE AND FACTS

Petitioner, a lawyer, arrived at 10:07 or 10:08 a.m. for a trial scheduled to start at 10:00, October 20, 1975. Petitioner immediately apologized (App. 3), said he had made "herculean efforts to get here at ten o'clock" (App. 4) and complained of the inefficiency of the preliminary hearing

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[1] The rule is for the guidance of judges and sets out priorities they should follow in yielding to each other. The rule creates no new penalties or disciplinary procedures for lawyers and no new obligation for lawyers to be prompt. The rule admonishes trial courts to "be receptive to counsel's application for a change of the trial date or an adjustment of the hours of trial . . ." where necessary (App. 26) and recognizes "the need to depart, on occasion, from rigid scheduling rules . . ." (App. 27). In any event, the D.C. Courts could not by rule create or expand a crime, nor could they lessen due process requirements.

court, citing a recent D.C. Bar study[2] which had suggested reforms in the scheduling of preliminary hearings (App. 5). Without further inquiry the Court denounced petitioner for giving "the public a bad impression of the whole system, to come down here and wait around because people such as you deside [sic] your order of priorities" (App. 6), and entered a judgment of summary contempt, with a fine of $10.00.

Shortly thereafter the Court entered a written "Order of Contempt" (App. 7). Within ten days petitioner filed a motion for reconsideration, setting out by affidavit exactly where he had been and what he had done the morning in question. The affidavit showed that petitioner had been obliged to postpone a preliminary hearing so he could take care of the trial; that he had waited in the preliminary hearing court till he saw by the clock that it was 9:56 (App. 10, paragraph 3.); that he then proceeded as fast as possible to the trial court, which should have taken less than three minutes (App. 11, paragraph 4.); that he did not tarry on the way, even though he encountered his preliminary hearing client and told him he could not stop to talk (App. 11, paragraph 6); that the clocks in the two buildings vary by as much as four minutes (App. 13, paragraph 11.); and:

> Never at any point did I alter or abandon my clearly formed intention to get to Courtroom 39

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2 "Report on Criminal Defense Services in the District of Columbia by the Joint Committee of the Judicial Conference of the D.C. Circuit and the D.C. Bar (Unified)", April 1975, by Daniel A. Reznick et al., page 24. Referred to as the "Riznick Report", App. 5.

> [the trial court] on time. This is the crux of the matter and I swear to it without hesitation or doubt.
>
> App. 11, paragraph 5.

By an order dated November 4, 1975, the lower court denied reconsideration (App. 14). The D.C. Court of Appeals affirmed (App. 15-20), not without some expressions of hesitancy (App. 20).

The most burdensome aspect of this case for petitioner is the lack of specific charges and the absence of a factual record. Anyone inquiring into this matter in the future will have no way of knowing why petitioner was held in contempt, and will surely find it hard to believe the contempt rests on one isolated and non-aggravated seven minutes tardiness. The D.C. Court of Appeals opinion epitomizes the harm that can be done once we depart from the traditional caution of the criminal process; speculation is piled upon speculation till an impression is given that has no link at all with what actually happened October 20, 1975.

– The opinion suggests petitioner should have warned the Court he had a conflict (App. 16 and 19). But petitioner did not have a foreseeable conflict. He planned to let the other lawyers go ahead with the preliminary hearing (App. 10). He tried over the weekend to call them and could not find them, and reasonably expected to find them in the preliminary hearing court before ten o'clock on the morning in question.

– The same objection goes for the suggestion that petitioner should have called the trial court's clerk (App. 16). Petitioner had no plan or fear of being late and did not think he would be late till he arrived in court at 10:08 (App. 12, paragraph 8.), so to suggest he might have called the clerk is at best begging the question. In a criminal matter this amounts to a presumption of guilt.

– Apparently the trial court thought that when petitioner left preliminary hearing court was not relevant because the trial court thought the duty to be on time was one of absolute liability (App. 7). The appellate opinion, however, directly accuses petitioner of "lingering" and "stopping" (App. 19), thereby implying that petitioner's affidavit is rejected as false. Thus this case can be read, should anyone be so inclined, as implying dishonesty and dishonorable behavior by petitioner. This could not have happened if petitioner and the courts had the benefit of a specific factual charge against petitioner.

– Most importantly, the appellate opinion is starkly silent about the most important fact, the fact that would dominate the record if there were a record: that petitioner, who had been taking assigned criminal cases, had deliberately kept his workload much lower than average, was giving all of his cases meticulous attention, and had never before been late to this judge's court or to any other (App. 9, paragraph 2.).

REASONS FOR GRANTING THE WRIT

I. SUMMARY CONTEMPT WAS ILLEGAL AND UNCONSTITUTIONAL BECAUSE THE CONDUCT CHARGED WAS NOT IN THE PRESENCE OF THE CONVICTING COURT AND WAS NOT SEEN AND HEARD BY HIM.

Every circuit considering the question has agreed that a lawyer's tardiness is not conduct in "the actual presence of the court", which may be punished summarily under Rule 42(a). In *U.S. v. Willett*, 432 F.2d 202 (4th Cir., 1970) a lawyer was given notice by telephone that he had missed a hearing that morning and might be held in contempt. When he got to court he was given an opportunity to explain why he had not been there, and then was summarily convicted. The Fourth Circuit reversed, holding that such absence could not be reached under Rule 42(a), and that Willett had not been given the "reasonable time for the preparation of the defense" required by Rule 42(b). In *In re Lamson*, 468 F.2d 551 (1st Cir., 1972) some lawyers delayed a trial for 12 minutes by getting stuck in an elevator. Later in the day the trial court convicted them summarily, apparently on the theory that they knew or should have known the elevator was unreliable. The First Circuit reversed: "These are the kinds of events which impress upon us that a failure to appear on time may often only be explained by witnesses who may not be immediately available or by more than three hours preparation by the offender." 468 F.2d, 552. (The opinion lists ten states which have also held that a lawyer's absence is not a proper subject for summary contempt. Id., at 553.) In *U.S. v. Delahanty*, 488 F.2d 396 (6th Cir., 1973), the Sixth Circuit dealt with facts quite similar to the instant case: a lawyer was summarily held in contempt for arriving ten minutes late to a scheduled hear-

ing, while he claimed he was from out of town and simply had trouble finding the courthouse and parking. His co-counsel, who had not planned to be there at all, was also summarily convicted. The Sixth Circuit reached the merits and held such conduct cannot be contempt, but also condemned the use of the summary procedure. "While the absence of Appellants was obvious to the Court, the reasons for their absence were not." 488 F.2d at 398. And in *Jessup v. Clark*, 490 F.2d 1068 (3d Cir., 1973) a court summarily convicted, after hearing his explanation, a lawyer who had gone to a state court when he was under an order to come to Federal court. The Third Circuit held that this could only be prosecuted under Rule 42(b). The contempts in *Coiro v. U.S.*, No. 74-1645 in this Court, cert. den. 44 U.S.L.W. 3206, and *In re Allis*, No. 75-1811, cert. den. 45 U.S.L.W. 3306, whatever else their defects, were not summary. Response by Solicitor General in *Allis*, page 6, footnote 2; *In re Allis*, 531 F.2d 1391 (9th Cir., 1976), 1392, 1395; Response by Solicitor General in *Coiro*, page 3.

Thus the D.C. Court of Appeals is alone in its holding in this case:

> We cannot accept appellant's contention that the court's acting summarily under Rule 42(a) was error on the ground that the allegedly contemptuous conduct did not occur "in the presence of the court". . . .
>
> App. 17.

Such unanimity against the District of Columbia local courts' view would require review by this Court even if the error were only a matter of rule, but in fact it is of Constitutional dimensions. *Jessup v. Clark*, 490 F.2d

1068, 1071. The Constitution prohibits any punishment, however benign the intent or however limited the class on which it falls,[3] without proof beyond a reasonable doubt adduced at a hearing. *In re Winship*, 397 U.S. 358. As said in that case:

> It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.
>
> *In re Winship*, 397 U.S. 358, 364.

If there is any exception for summary contempt it requires the highest "justification of necessity, see *Offutt v. United States*, 348 U.S. 11, 14 (1954) . . .", *Taylor v. Hayes*, 418 U.S. 488 (1974) at 497, certainly more than is found in a non-aggravated tardiness. ". . . *Sacher* [343 U.S. 1 (1952)] noted that '[s]ummary punishment always, and rightly, is regarded with disfavor . . .' 343 U.S., at 8." Id., at 498.

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[3] Litigants and lawyers can of course be made to pay costs for delaying courts. This could be based on absolute liability and summarily handled. Petitioner, moreover, was working under a CJA-paid court appointment; the court could have easily docked him for being late. But the criminal contempt in this case is a radically different thing. It is a "serious crime" and grounds for disbarment under the rules of the two bars petitioner belongs to. D.C. Bar Rules, Rule XI, section 15; Rules of New York Appellate Division, 1st Department, 603.12. The D.C. Court of Appeals noted this conviction "could hinder [petitioner's] admission to the bar of a foreign jurisdiction." (App. 20.) Thus the conviction should reflect a reasoned adjudication that petitioner did something seriously wrong.

So the exception for summary contempt requires that all of the facts be personally perceived by the convicting judge, who then must reduce them to a certificate in testimonial detail:

> As we said in *In re Oliver*, 333 U.S. 257, 275-276,
>
> "If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing . . . ."
>
> *Johnson v. Mississippi*, 403 U.S. 212, 215.

And cf. *Harris v. U.S.*, 382 U.S. 162 (1965) and *Cooke v. U.S.*, 267 U.S. 517 (1925).

Such constitutional error in the D.C. local courts requires this Court's intervention. *Pernell v. Southall Realty*, 416 U.S. 363 (1974).

Moreover, the rule in the D.C. local courts is in conflict with that of the D.C. federal courts, a conflict this Court has a special duty to resolve. *Pernell v. Southall Realty*, *supra*, at 368, footnote 4. The federal courts in the District of Columbia have said that a Rule 42(b) hearing must be held if the alleged tardiness "involves, by way of excuse, matters outside the presence of the court. . ." *In re Gates*, 478 F.2d 998, at 1000, 156 U.S. App. D.C. 88 (1973).[4]

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[4] *In re Niblack*, 476 F.2d 930, 156 U.S. App. D.C. 20 (1973) is not contrary, because it does not reveal that Niblack had an excuse. (continued)

Semble, *Klein v. U.S.*, 151 F.2d 286, 80 U.S. App. D.C. 106 (1945) and *Sykes v. U.S.*, 444 F.2d 928, 930, 144 U.S. App. D.C. 53 (1971). This is the exact opposite of the approach of the D.C. Court of Appeals in this case, where the existence of one undisputed fact in the presence of the court, petitioner's not being there, is allowed to bootstrap the host of out-of-court facts into a 42(a) treatment. This Court should reconcile the two interpretations of D.C. law.[5]

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[4] (continued)
Neither is *In re Farquhar*, 492 F.2d 561 (D.C. Cir., 1973), which quotes *Gates* with approval, at 563-564. See footnote 7 in *Jessup v. Clark*, *supra*, 490 F.2d at 1072, and *In re Allis*, 531 F.2d at 1392, which criticize the D.C. Circuit for not holding that all absence or tardiness is outside the presence of the court for Rule 42(a) purposes. To the extent the D.C. Circuit disagrees with the others, its view is more accurate: it is not the lawyer's physical absence that removes the case from Rule 42(a), it is the existence *vel non* of issues outside the court's direct knowledge which may. Thus, for instance, a lawyer who announced he was leaving the court in protest, and left, could be held in 42(a) contempt for his absence. But this case involves both absence and issues outside the trial court's knowledge, so the D.C. local court's decision is in conflict with both the D.C. Circuit and the other circuits.

[5] Petitioner tried to appeal this matter to the D.C. Circuit under 11 D.C. Code 301(1). The D.C. Circuit rejected the appeal without comment, apparently on the grounds that 301(1) is transitional and applied only to federal offenses tried under the former jurisdiction of the local D.C. courts. See *Thompson v. U.S.*, No. 75-8086 and *Givens v. U.S.*, No. 76-8014, D.C. Circuit, November 24, 1976. It seems clear petitioner would have no collateral way to enforce his federal rights if this Court were to deny certiorari. *Edmunds v. Chang*, 509 F.2d 39 (9th Cir., 1975).

This case squarely presents this issue because there was no attempt at notice or hearing at all. When petitioner arrived seven minutes late he vigorously protested that he was not at fault. App. 3-5. After the lower Court stated his view of what happened, petitioner said: "Your Honor, may I protect my right to demand a hearing before – a citation and hearing and appealable record – ", App. 6. The trial Court replied: "Summary contempt." (App. 6) The D.C. Court of Appeals was equally forthright in holding that they thought the matter could be treated summarily, with no notice or hearing. Opinion, App. 17.

Thus the issue is squarely presented and hits three grounds for this Court's certiorari jurisdiction: the decision below conflicts with all circuits which have ruled on the precise issue; it conflicts with the D.C. Circuit's view of District of Columbia law; and it abridges the Constitutional right to due process. This Court should grant certiorari, and, there being no authority to support the decision below, should summarily vacate the contempt without further briefing or argument.

II. THE SUMMARY PROCEDURE DENIED PETITIONER EVERY ASPECT OF DUE PROCESS.

A. There was no notice of the charge.

The Sixth Amendment entitles an accused "to be informed of the nature and cause of the accusation", and Rule 42 (b) requires a notice which "shall state the essential facts constituting the criminal contempt charged and describe it as such". But to this day no one knows whether the trial Court thought that petitioner should not have gone anywhere on the day he had a trial scheduled, or thought that petitioner had deliberately chosen to wait

in another courtroom knowing it was past 10:00 o'clock, or what; there was no notice of the wrong charged.

B. The trial judge did not certify what he saw and heard which constituted a contempt.

The "Order of Contempt" (App. 7) has none of the specificity required by *Pietsch v. President*, 434 F.2d 861 (2d Cir., 1970), *In re Williams*, 509 F.2d 949 (2d Cir., 1975), etc. *U.S. v. Marshall*, 451 F.2d 372 (9th Cir., 1971) makes it clear, at 374, that the recitation of the judge's specific and personal knowledge is a due process requirement in a summary contempt.

C. The contempt upheld on appeal is not the trial court's contempt.

The trial court avoided any statement as to where he thought petitioner had been, when he thought petitioner had left the other courtroom, how long he thought it should have taken petitioner to get from one courtroom to the other, etc., because he knew he could not speculate about these facts without a Rule 42(b) hearing, and he thought these facts were irrelevant: the trial court thought the duty to get to his court on time was absolute and found petitioner in contempt for his breach of that absolute duty. App. 7. Petitioner on appeal pointed out this was not the law and the D.C. Court of Appeals could not disagree. See *In re Brown*, 320 A.2d 92 (D.C.C.A., 1974). But the D.C. Court of Appeals then invented a wholly new set of facts and upheld the contempt on the theory that petitioner chose to stay in the other courtroom past 10:00 o'clock. Even if there were evidence to support this, and there is not, a contempt conviction must be

either upheld on appeal or reversed, it cannot be made over into a new accusation in the appellate court and inflicted on the defendant without notice or hearing. *Eaton v. Tulsa*, 415 U.S. 697 (1974) is squarely on point and would require reversal of this contempt if nothing else did.

D. There is no evidence to support the conviction.

Nowhere in this perfunctory and summary record is there a scintilla of contradiction of petitioner's affidavit (App. 9), or a scintilla to uphold the erroneous statement in the Court of Appeals' decision that petitioner lingered in preliminary hearing court (App. 19), and proceeded to the trial court only "As soon as he found" the co-counsel he had to see (App. 16). It is uniquely offensive to due process to be confronted on appeal with a wholly new and fictional set of facts, but it is just the sort of error likely to follow from the basic mistake of trying to handle a complicated out-of-court situation by summary adjudication.

III. THE CONDUCT CHARGED COULD NOT UNDER ANY CONSTRUCTION BE CONTEMPT.

Contempt consists of 1) some departure from the contemnor's proper role in court proceedings, which 2) delays or frustrates the court's business. *U.S. v. Seale*, 461 F.2d 345 (7th Cir., 1972). Both elements are needed for contempt.

Both elements are missing in this case. As to the first: "Appellant correctly points out that he had a duty to resolve the conflict brought about by the scheduling of a preliminary hearing at the same time as the trial," says the Court of Appeals' opinion (App. 19). The Court of Appeals expressly found ". . . his [appellant's] actions rep-

resented a good faith attempt to straighten out his conflicting obligation with two other courts." (App. 19.) The opinion concludes with an admonition that contempts should not "be based on a mere technicality," as this one was. App. 20.[6]

In *Maness v. Meyers*, 419 U.S. 449 (1975), this Court held a lawyer could not be held in contempt for advising his client to refuse to answer a question on Fifth Amendment grounds. Certainly the lawyer's advice delayed and frustrated the court's proceedings, but *Maness* recognized that lawyers are a part of the legal system and it cannot be contempt for a lawyer to carry out his duty.

Petitioner's visit to preliminary hearing court, which resulted in his seven minute lateness, was part of his duty.[7] A lawyer is the officer on whom much of the responsibility for the efficient running of the court falls. If he fails to summon his witnesses, or to prepare his cases, or to

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[6] To the same effect see the ABA "Standards, The Function of the Trial Judge", section 7.4, cited with approval in *Taylor v. Hayes*, 418 U.S. 488, 499, footnote 8; and section 7.2.

[7] Rule 104(c)(3) (App. 28) provides:

> Attorneys are obliged to take action immediately upon becoming aware of any conflict and specifically to call the conflicting engagements to the attention of the judge being asked to yield, and to pursue the matter until the conflict is resolved. Such matters may be presented to the judge in open court as a preliminary matter, with advance notice to other counsel.

Read literally, this could have obliged petitioner to stay at the preliminary hearing court. Certainly it obliged him to stay there till time to leave for the trial.

keep in touch with co-counsel, or to schedule things properly, etc., proceedings falter. He cannot be treated like the more passive participants. There is no suggestion in this case of any lapse of memory, as in *In re Allis*, 531 F.2d 1391 (9th Cir. 1976), or any private self-interest of the lawyer. The absence of these is fatal to a contempt charge. The practice of law is in the public interest and "a good faith attempt to straighten out [a lawyer's] conflicting obligation with two other courts" cannot be a crime. Cf. *Morissette v. U.S.*, 342 U.S. 246 (1952).

Nor was there the second element of contempt, a delay of the court's business. The court to which petitioner owed his duty was the Superior Court of the District of Columbia, constituting both the preliminary hearing court and the trial court. Cases such as *In re Farquhar*, 492 F.2d 561 (D.C. Cir., 1973) recognize that it cannot be contempt to fail to take one judge's side in a conflict with another judge.[8] In fact, two lawyers, three defendants, and a policeman waited in the preliminary hearing court for the entire day of October 20, 1975, because of the trial court's refusal to accommodate them. This does not show in the record; the record is devoid of any evidence that the entire business of the Superior Court was delayed, and if so who was at fault. Some such evidence is needed to sustain a conviction of contempt.

One might well argue that a delay of seven minutes standing alone without any suggestion of ill will, disrespect, or likelihood of repetition, cannot amount to the "actual obstruction of justice" required for contempt by

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[8] Semble, *Ex parte Butler*, 372 S.W.2d 686 (Ct. Crim. App., Texas, 1963), voiding the contempt conviction of a lawyer who had cases on two calendars and missed one while tending to the other.

In re McConnell, 370 U.S. 230, 236 (1962). McConnell's threat to keep on asking questions until some bailiff stopped him seems to have caused a recess, which must have been at least seven minutes long. Yet this was held to be no actual obstruction. Cf. *U.S. v. Seale*, *supra*, rejecting the government's argument that "any interruption" can be contempt, and requiring a "material disruption or obstruction". 461 F.2d 345, 369.[9]

No such latitude was relied on by petitioner on the occasion in question. Petitioner agrees it would be highly desirable if all trials began promptly, and has said by affidavit that he tried to do that on October 20, 1975. But there must be some room for error that is regrettable but not criminal.[10] Seven minutes, under these circumstances, was well within such a margin.

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[9] Petitioner's affidavit (App. 13) shows the clocks in the Superior Court buildings varied by as much as four minutes. This Court may take judicial notice that it is seldom that a trial court starts business precisely on the appointed hour.

[10] The Privy Council opinion in *Izuora v. Reginam*, [1953] A.C. 327, [1953] All E.R. 827 (P.C.), holds that even counsel's failure to appear when specifically ordered, frustrating progress entirely, is a breach of the bar rules but "cannot properly be placed over the line that divides mere discourtesy from contempt." Id., 830. The lesson is obvious: the British Courts' high standards of efficiency and professionalism were not reached by the low road of criminal processes.

CONCLUSION

The writ of certiorari should issue to review the decision of the District of Columbia Court of Appeals. The case should then be set for briefing and argument, or, there being no argument in support of the lower Court's ruling, the conviction of criminal contempt should be summarily vacated.

Respectfully submitted,

GAILLARD T. HUNT

2231 California Street, N.W.
Washington, D.C. 20008
Tel.: 202-234-0950

March 1977

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DOCKET

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

In the Matter of

GAILLARD T. HUNT, Esq.,

SP 1528-75

Respondent

Oct 21 1975
E. Christensen -- Ct. Reptr.
This court finds Mr. Gaillard T. Hunt, Esquire in CONTEMPT OF COURT for his failure to appear promptly at 10:00 A.M. for resumption of TRIAL in case 45576-75, U.S. vs. George Turner.
Court sentences Mr. GAILLARD T. HUNT to pay fine of $10.00 (ten dollars) on or before 4:00 p.m. on 10-21-75
JRH
DH Judge Hess

10/21/75
Paid in Full $10.00 GY

Oct. 30, 1975
Motion for new trial, New Judgment and other relief; Memorandum of Points and authorities in support of motion and Affidavit filed. Forwarded to Judge Hess this date. (ec)

11-4-75
Motion for New Trial, New Judgment and Other Relief denied. Order filed within.

11/11/75
Appeal Fee Paid $5.00 JHS

Nov. 11, 1975
Notice of Appeal filed. atc

Dec.13, 1975
Appeal Record certified to the D.C.C.A. gam

Dec 10 1976
Printed decision of the D.C.C.A. affirming-reversing [sic] the decision of the lower court.

2-18-77
Certified copy of Judgment received from the D.C.C.A. affirming the judgment of the lower court.

TRANSCRIPT
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

In the Matter of:

G.T. HUNT.

Docket Number
SP 1528-75

Washington, D.C.
October 20, 1975

The above-entitled action came on for hearing before the Honorable JOHN R. HESS, Associate Judge, in Courtroom Number G-139, commencing at approximately 10:08 a.m.

* * * * *

[Tr.2]

MR. HUNT: I apologize.

THE COURT: It is about eight after ten, Mr. Hunt. Last Friday I specifically instructed everybody to be here on time. If one person is missing we can't go forward. All the jurors and everybody else but you.

MR. HUNT: My apologies, Your Honor. I was over at the Preliminary Hearing Court where it is impossible to get anything put off or find out what's on the calendar until actually ten o'clock.

THE COURT: I don't understand that to be so. I have been over at Preliminary Hearing Court and have received several

phone calls from attorneys who have been in trial and make arrangements to take them at lunch time or other times during the day.

MR. HUNT: Very well. I'm sorry.

THE COURT: You knew you were to be here at ten o'clock. You knew you were to be here at ten o'clock, right?

MR. HUNT: Yes, I did. I made herculean efforts to get here at ten o'clock.
Does the Court want to hear my full story?

THE COURT: Yes, I do. Otherwise I will hold you in contempt.

[Tr.3]

MR. HUNT: Very well. The story begins like this. I got here to the court system at quarter of nine. I went before Judge Bacon to postpone a motion for jury trial that is pending before her. I got out of there at, I believe it was a quarter of ten or twenty of ten.
I proceeded directly to courtroom eighteen where I tried to find out from the clerk if the United States was ready on the preliminary hearing. The United States Attorney was not there. There were two co-counsel in that case. I searched for them. As soon as I found them I authorized them to go ahead without me. There was no way I could find out who they were prior to today because I was not sure of the names of the defendants. I had, in

in fact, called my defendant yesterday to find out if such an arrangement could be made.
As soon as I found them I proceeded directly here and I am here. I arrived here ten of eight (sic).
I'm sorry, Your Honor. I do apologize. But only in the sense that this kind of thing is the sort of burden that an attorney practicing in this court always has to take on.
I formally practiced in the courts of New York City where the calendars are much more crowded and the custom is for the clerks to prepare, well ahead of time, extensive lists of the cases to be called and it is possible then by telephone/ to [Tr.4] deal with clerks beforehand to arrange things much more smoothly.
I have urged at various times this sort of thing be adopted in this court and I do hope some day for instance in the preliminary hearing court, that it does come possible to schedule a preliminary hearing for a given time frame during the day instead of having to scramble in at ten o'clock and wait until the U.S. Attorney shows up or co-counsel shows up to arrange a postponement.
The Risnick Report on the problems of Criminal Justice Act lawyers practicing in this court, particularly zeros in on that one problem: the preliminary hearing court. The waiting time logged down for Criminal Justice Act lawyers is phenomenal from preliminary hearings. It could all be eliminated and the type of

tardiness, that I apologize for today, could all be eliminated if there were some clerks who could arrange the schedule of preliminary hearings.

THE COURT: We have a rule here that states precisely what your responsibilities are. This states that when you are in trial that is your first obligation. Plus the fact there is no reason why -- Mr. Hall has been here for some period of time -- why you can't call if you are not going to be here.

I think your absence was willfull. You knew to be here and yet you went somewhere else. You have delayed the/ pro- [Tr.5] ceedings. The jurors were in the box. Finally they went outside. I told them to wait outside. You delayed the defendant, the prosecutor and the witnesses and everybody else.

I don't operate this way, Mr. Hunt. I can't tolerate this type of conduct. It gives the public a bad impression of the whole system, to come down here and wait around because people such as you deside your order of priorities.

I find you in contempt of Court. I fine you ten dollars by close of business tomorrow. That's four o'clock tomorrow.

MR. HUNT: Your Honor, may I protect my right to demand a hearing before -- a citation and hearing and appealable record --

THE COURT: Summary contempt.
All right, bring in the jury.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division

In The Matter of	)	Criminal No.
Gaillard T. Hunt, Esquire	)	SP 1528-75
	)	

ORDER OF CONTEMPT

This matter arose in the case of United States v. George Turner, Criminal No. 45576-75, during a trial in progress before the undersigned. The trial began on Friday, October 17, 1975. At the end of the day, a recess was called at which time all participants were advised that the trial would resume promptly at 10:00 a.m. on Monday, October 20, 1975. The Court specifically admonished all participants, including Mr. Hunt, attorney for the defendant, to appear on time, emphasizing that the absence of any one individual would unduly delay the proceedings. On Monday morning at 10:00 a.m., the case was called. Although government counsel and his witnesses, the defendant, and thirteen jurors were present and ready to proceed, Mr. Hunt did not appear until nearly ten minutes later. When he finally arrived, Mr. Hunt was given an opportunity to explain his tardiness.

Having failed to explain his action to the satisfaction of the Court, the Court concludes that Mr. Hunt's behavior was, under the circumstances of this case, deliberate and willful and constituted contempt committed in the presence of the Court.

In view of all the foregoing, the Court summarily finds Mr. Gaillard T. Hunt to be in contempt and sentences him to pay a fine of ten dollars ($10.00) to be paid no later than 4:00 p.m., October 21, 1975.

Original signed by John R. Hess
John R. Hess, Judge

cc: Gaillard T. Hunt, Esquire

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA

GAILLARD T. HUNT, being duly sworn, deposes and says:

1. I am the respondent in No. SP 1528-75.

2. I was assigned under the CJA to represent Mr. George Turner in a shoplifting case (Criminal No. 45576-75). After many adjournments, etc., the matter came on to be tried before Judge Hess on October 17, 1975. Around 4:30 p.m. that day we finished picking the jury. I moved that we go as far as possible in the case before adjourning. Judge Hess, however, ruled that we should give up the remaining half hour of the normal court day and adjourn to 10 a.m. on Monday, October 20, 1975. I had never had business before Judge Hess before and thus had never been late in his courtroom. As we adjourned Judge Hess remarked to the jury, or to the courtroom at large, that we would resume promptly at 10:00 a.m. on Monday, October 20, 1975, and that if anyone were late it would hold the rest of us up. Because I had never been late to Judge Hess' Court, and because I had just been in the position of advocating that we get on with the case, I did not interpret those remarks as addressed to me. There was no suggestion whatever that the Court was exercising its inherent authority to enter or issue an order about scheduling which could result in anyone being held

in contempt.

But I did feel myself under the usual professional obligation to get to court at the time scheduled, an obligation I have always held in the highest regard -- and have always been more successful than most practitioners in complying with, as I try not to overload my calendar.

3. I had two other matters on for October 20, 1975. One was a motion before Judge Bacon, the other was a preliminary hearing in Courtroom 18. Thus I took pains to get up and get to the court much earlier than usual. I was there at 8:45 a.m. I was not able to get the postponement from Judge Bacon until about 9:40 or 9:45. I then proceeded to the preliminary hearing court, Courtroom 18. There I found the U.S. Attorney had not shown up. My case there involved three defendants, so I felt I could ask one of the other lawyers to stand in for me there, but I could not find anyone in Courtroom 18 to discuss the case with. So I waited until 9:56 and left Courtroom 18.

I remember distinctly that I left Courtroom 18 at or before 9:56 because I remember looking at the clock in the back of that courtroom and noting the minute hand had just passed 9:55. This impressed me because I figured I had to stop trying to take care of that matter and get back to Judge Hess' courtroom promptly.

4. I had no intention of being late to Judge Hess' courtroom. On the contrary

I had every intention of getting there on time. I believed the time required to go from Courtroom 18 to Judge Hess' courtroom, Courtroom 39 in the Pension Building, would be about 120 seconds, or two minutes. So when I left Courtroom 18 I not only intended but expected to get [to] Courtroom 39 on time, and that was a reasonable expectation.

5. Never at any point did I alter or abandon my clearly formed intention to get to Courtroom 39 on time. This is the crux of the matter and I swear to it without hesitation or doubt.

6. I cannot now explain how it took eleven minutes for me to get to Courtroom 39. I do not have a watch. There are no clocks on the route between Courtrooms 18 and 39. I have since then walked that route with a borrowed watch and found it took 155 seconds. I also found that the clock in Courtroom 18 is one minute behind that in Courtroom 39, so when I left at 9:56 by the Courtroom 18 clock it was 9:57 by the Courtroom 39 clock. As I left Courtroom 18 I met in the hallway my client in that preliminary hearing, a Mr. Spell, and his two codefendants and their lawyers. Mr. Spell recognized me, so I necessarily stopped and explained to him that I was needed elsewhere and asked if the other lawyers could cover for me. They agreed. I also handed Mr. Spell a note excusing him from work, which he had asked me to bring for him. I thought at

the time that this conversation was very short and on reflection I still do not see how it could have lasted more than two or three minutes, but apparently it did.

7. At no point did I alter my intention to get to Courtroom 39 on time. I intended to get to Courtroom 39 on time and acted to that end: I spoke hastily, I refrained from discussing his case in detail with Mr. Spell and his codefendants, as I wanted to, and I walked rapidly towards Courtroom 39. I used the stairs rather than wait for the elevator. I viewed my duty to get to Courtroom 39 as a continuing one, and one of increasing gravity. At no point did I deliberately, willfully, or intentionally give up or abandon that obligation.

8. When I arrived at Courtroom 39 I found everyone waiting for me. I looked at the clock and was considerably surprised to see it said 10:08.

9. When the Court asked me to explain, I considered the danger of a contempt citation and rejected it because of the short time involved and the lack of any warning. I therefore addressed myself to the question of whether I had acted with due professional diligence throughout that morning, and told the Court of the difficulty of scheduling preliminary hearings. In doing so I may have given -- or failed to negate -- an impression that I had deliberately chosen to be late to

Courtroom 39 so that I could attend to the preliminary hearing. Had I understood that a contempt citation was being considered, and that the only question in issue was my intent, I would have told the Court of the above facts, and would have made it clear that I never deviated from my intent to arrive at Courtroom 39 on time.

11. On October 28, 1975, I checked the clocks in Building A. The two clocks in the Misdemeanor Office are 4 minutes apart. The clock in the Witness Room on the third floor is 2 minutes behind the clock in the third floor hallway. The clock in the Lawyers Lounge is somewhere between them.

/s/ Gaillard T. Hunt
GAILLARD T. HUNT

Subscribed and sworn to before me this 30th day of October, 1975.

/s/ Hilda Kalish
Notary Public, D.C.

My Commission expires July 14, 1979

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Special Proceedings Section

In The Matter Of)
) SP 1528-75
MR. GAILLARD T. HUNT, ESQUIRE)

ORDER

This matter is before the Court on respondent's "Motion For New Trial, New Judgment, and Other Relief". Upon consideration of the motion, the points and authorities in support thereof, the affidavit, and the record in this case, and it appearing that Mr. Hunt admittedly heard the Court's direct order that all participants be in court at 10:00 a.m. on Monday, October 20, 1975, and that Mr. Hunt, in violation of said order and in violation of Rule 104 of the Civil Rules and Rule 57 of the Criminal Rules of this Court, deliberately ignored the order and rule by determining his own order of priorities, it is this 4th day of November, 1975,

ORDERED, that the respondent's "Motion for New Trial, New Judgment, and Other Relief be, and the same hereby is, denied.

Original signed by John R. Hess
John R. Hess, Judge

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10300

IN THE MATTER OF:

GAILLARD T. HUNT, APPELLANT.

Appeal from the Superior Court of the District of Columbia

(Argued October 12, 1976 Decided December 10, 1976)

Gaillard T. Hunt, pro se.

Daniel A. DeRose, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, *John A. Terry* and *James F. Hibey*, Assistant United States Attorneys, were on the brief, for appellee.

Before GALLAGHER, NEBEKER and YEAGLEY, *Associate Judges.*

PER CURIAM: Appellant Gaillard T. Hunt, a member of the bar, was adjudged in contempt of the Superior Court by Judge John R. Hess and fined $10 on October 20, 1975. He contends (1) that the court erred in proceeding under Rule 42(a) of the Rules of Criminal Procedure of the Superior Court rather than under Rule 42(b); (2) that the order of contempt fails to state in sufficient detail the facts upon which it was predicated and (3) that the evidence was insufficient to establish contemptuous conduct. We affirm.

[2214]

The summary order of contempt was entered during a misdemeanor trial before Judge Hess where appellant was representing the defendant. The trial began on Friday, October 17. Before adjourning for the weekend, the judge admonished the participants, including appellant, to be in court promptly at 10 a.m. the following Monday. No one, including appellant, advised the court he had a conflicting engagement. On October 20 at 10 a.m. all participants were present in the courtroom and ready to proceed except for appellant. When appellant finally appeared at 10:07 or 10:08, he apologized and was given an opportunity to explain his tardiness. He stated that he had attended to two other criminal matters earlier that morning. Appellant said that he arrived at the courthouse at 8:45 a.m. and appeared before Judge Norma Johnson* for the purpose of postponing a motion. He explained further that he went next to Preliminary Hearing Court at 9:45 a.m. to look for his two co-counsel in another case in which he was involved to authorize them to go ahead with a preliminary hearing without him. As soon as he found them, he said that he proceeded directly to Judge Hess' courtroom.

The trial court responded to appellant's explanation as follows:

> We have a rule here that states precisely what your responsibilities are. This states that when you are in trial that is your first obligation. [1] Plus the fact there is no reason why —Mr. Hall [a court clerk] has been here for

---

[1] Super. Ct. Civ. R. 104(b)(3) states: "Nontrial matters in a trial court will yield to trials in any court." Rule 104 applies to the Criminal as well as the Civil Division. *See* Super. Ct. Cr. R. 57(a).

*Corrected to "Judge Sylvia Bacon" in the published version.

> some period of time—why you can't call if you are not going to be here.
>
> I think your absence was willfull [*sic*]. You knew to be here and yet you went somewhere else. . . . You delayed the defendant, the prosecutor and the witnesses and everybody else.
>
> . . .It gives the public a bad impression of the whole system, to come down here and wait around because people such as you decide your order of priorities.
>
> I find you in contempt of Court. I fine you ten dollars. . . .

Appellant paid the fine and subsequently filed a motion for reconsideration of the contempt citation and attached thereto a sworn affidavit in which he restated the reasons for his tardiness. The trial court denied the motion stating that appellant had deliberately ignored the court's order to appear in court promptly and Rule 104 "by determining his own order of priorities". Appellant filed this appeal pro se.

We cannot accept appellant's contention that the court's acting summarily under Rule 42(a) was error on the ground that the allegedly contemptuous conduct did not occur "in the presence of the court". The identical argument has been rejected by this court on several occasions. *See, e.g., In re Rosen*, D.C.App., 315 A.2d 151, *cert. denied*, 419 U.S. 964 (1974); *In re Nesbitt*, D.C. App., 313 A.2d 576, 578 (1973). *See generally* Annot., 97 A.L.R.2d 431 (1964).

Appellant's argument that instituting summary procedures after he arrived at court was inappropriate since the alleged contemptuous conduct, *i.e.*, absence from

court, had come to an end is also without merit. The court found that appellant deliberately had disregarded an explicit court order resulting directly in the delay of an ongoing trial. The court in its discretion could find defendant guilty of contempt and impose a sanction against appellant immediately after the contemptuous conduct had ceased. *See In re Rosen, supra.*

Appellant argues also that the conviction should be vacated since the order of contempt fails to specify in sufficient detail the facts upon which the finding of contempt was predicated.[2] The trial court observed in the order that at the close of the day on Friday it ordered all the participants in the trial, including appellant, to be in court promptly at 10 a.m. on Monday; that all participants except appellant were present when the case was called at 10 a.m.; that appellant "did not appear until nearly ten minutes later"; that "appellant failed to explain his action to the satisfaction of the court" whereupon the court concluded that his behavior was "deliberate and willful and constituted contempt committed in the presence of the court."

The order informs us precisely what conduct constituted the contempt. We know from the order that it was appellant's seven or eight minute tardy arrival for trial in defiance of an explicit court order and his failure to provide a satisfactory excuse which the court found contemptuous. This contrasts with contempt citations reviewed in *In re Williams*, 509 F.2d 949 (2d Cir. 1975); *United States v. Marshall*, 451 F.2d 372 (9th Cir. 1971); and *Pietsch v. President of the United States*, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971), where factual situations more complicated than the one

[2] Rule 42(a) provides that: "The order of contempt shall recite the facts" upon which the contempt conviction rests.

presented here were described in conclusory, generalized language thereby preventing intelligent appellate review. We conclude that the order here, although very brief, specifies what the act of contempt was and discloses the basis of the court's decision with sufficient clarity to support the conviction.

Appellant contends finally that the evidence was insufficient to establish contemptuous conduct since it failed to show that he acted deliberately and wilfully in appearing late for trial. He claims that he had no intention of being late and that his tardiness should have been excused since it stemmed solely from his effort to meet his obligation to appear personally before a preliminary hearing court to reschedule a nontrial proceeding.

Appellant correctly points out that he had a duty to resolve the conflict brought about by the scheduling of a preliminary hearing at the same time as the trial. *See* Super. Ct. Civ. R. 104(c)(3). However, he mistakenly concludes therefrom that he was justified in lingering at the preliminary hearing court and stopping to speak with co-counsel. Rule 104(b)(3) makes clear that the trial had precedence over all other matters. Where the potentiality for his being late for trial was so apparent, he had an obligation at least to contact the trial court and advise it of the conflict. The trial court properly inferred from appellant's actions and his explanation that he had deliberately and willfully substituted his own judgment for a direct order of the court even though his actions represented a good faith attempt to straighten out his conflicting obligation with two other courts. It was clearly within the court's discretion to treat appellant's tardiness as an act of contempt and accordingly we decline to disturb the court's finding.

Finally, although we have the authority to modify the rather nominal penalty imposed by the court, *In re Gates*, 156 U.S.App.D.C. 88, 90 n.3, 478 F.2d 998, 1000 n.3 (1973), we decline to do so. We would remind the trial court, however, that for a lawyer, the amount of the fine for contempt is of little consequence compared to the potential stigma flowing from a criminal record. It, for example, could hinder his admission to the bar of a foreign jurisdiction. A contempt conviction, therefore, should not be based on a mere technicality, but should be imposed only where necessary to maintain an orderly system of justice.

Accordingly, the judgment appealed from is

Affirmed.

[2219]

DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia
Court of Appeals
Filed Feb 9 1977
Alexander L. Stevas
Clerk

No. 10300 January Term, 1977

In the Matter of:

GAILLARD T. HUNT SP 1528-75

Appellant

BEFORE: Gallagher, Nebeker and Yeagley,
Associate Judges

O R D E R

On consideration of appellant's petition for rehearing it is

ORDERED that appellant's petition is denied.

PER CURIAM

DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia
Court of Appeals
Filed Feb 9 1977
Alexander L. Stevas
Clerk

No. 10300 January Term, 1977

In the Matter of:

GAILLARD T. HUNT SP 1528-75

Appellant

BEFORE: Newman, Chief Judge; Kelly, Fickling, Kern, Gallagher, Nebeker, Yeagley, Harris and Mack, Associate Judge.

O R D E R

On consideration of appellant's petition for rehearing en banc, it is

ORDERED that appellant's petition is denied.

PER CURIAM

SUPERIOR COURT CRIMINAL RULES, RULE 42
-- CRIMINAL CONTEMPT

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in paragraph (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney, of the Corporation Counsel, or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to be released on conditions or detained as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

SUPERIOR COURT OF D.C. - CIVIL RULES

RULE 104

AVOIDANCE AND RESOLUTION OF CONFLICTS IN ENGAGEMENTS OF COUNSEL AMONG THE COURTS IN THE DISTRICT OF COLUMBIA

The following provisions, which implement the "Procedures for Avoiding and Resolving Conflicts in Engagements of Counsel to Appear Before the Courts in the District of Columbia" dated April 18, 1973, adopted by and applicable to the United States Court of Appeals for the District of Columbia Circuit, the United States District Court for the District of Columbia, the District of Columbia Court of Appeals, and the Superior Court of the District of Columbia, shall apply to matters scheduled in this court:

(a) PRIORITY TO BE ACCORDED APPELLATE COURTS. Trial proceedings in this court will yield, and if under way will be held in abeyance, during argument by trial counsel in an appellate court.

(b) PRIORITIES IN TRIAL COURTS. Actual trials of civil or criminal cases in this court or in the U.S. District Court for the District of Columbia will be accorded priority over any nontrial matters in either court. For the purpose of this Rule, a hearing on a preliminary injunction shall be regarded as a trial. A judge shall set a date for trial only after ascertaining that trial counsel have no conflicting trial

or appellate engagement in any court within the District of Columbia. For the category of cases being handled on a master calendar system, where cases are set without presence of counsel and notice is sent to counsel when the case is set by the Civil or Family Assignment Commissioner, or is reset by the commissioner if it develops that the original setting could not be accommodated, an attorney who claims the notice presents him with a conflict shall take action promptly after receipt of advice of the trial date set, and make application for a change in date. The judge in control of the calendar will take or approve action on such application only after ascertaining the pertinent court engagements of the counsel involved. If, despite the foregoing and the obligations imposed on counsel by section (c) of this Rule counsel should have more than one trial set on one day, the following priorities will be recognized:

(1) That case which is first set to commence trial on a specific day will receive priority over cases which are later set to commence trial on that day. A continued case shall be treated as set as of the last setting date.

(2) Any trial in progress, including a trial in progress from day to day, shall take precedence over trial or nontrial engagements of counsel which are set for times during which the trial is still

in progress.

(3) Nontrial matters in a trial court will yield to trials in any court.

(4) If a scheduled trial conflicts with a previously set nontrial matter and, because of the urgency or complexity of the nontrial matter or the number of persons involved, it would be difficult to reschedule the nontrial matter, counsel shall immediately advise the court in which or the judge before whom the conflicting trial is scheduled. The court or the judge will be receptive to counsel's application for a change of the trial date or an adjustment of the hours of trial, but shall retain discretion to grant or deny such an application.

(5) The judges of this court, insofar as practical, will atempt to adjust their schedules to enable an attorney to attend to brief nontrial matters such as pleas, sentences, or status and pretrial conferences pending in another court. It is recognized that emergency situations will arise and that certain types of cases may require special consideration. The judges of this court will attempt to accommodate these

situations by recognizing the need to depart, on occasion, from rigid scheduling rules when such situations are brought to their attention by counsel.

(c) RESPONSIBILITIES OF COUNSEL. It is the professional responsibility of attorneys to avoid the setting of conflicting engagements in the courts, to inform the courts of expected difficulties or conflicts which may arise, and to achieve the resolution of such conflicts or problems at the earliest possible time. The following particular obligations are imposed upon counsel:

(1) Attorneys are expected to carry with them at all times they are in court a calendar of their future court appearances.

(2) Attorneys shall appear personally before the judge when a case is being set, reset, or continued except as otherwise specified below. They shall in every case inform the court fully as to any matters which may conflict with a setting, resetting, or continued date being considered by the court. Counsel shall not schedule engagements which they cannot reasonably expect to attend at the time scheduled. They shall observe such limitations on the number of matters they schedule as are imposed

herein, or are imposed by the individual courts of this jurisdiction, or which arise by reason of their professional obligations to their clients. The sole exception to the requirement that counsel appear personally before the judge when a case is being reset or continued arises when he is physically unable to be present. In such event he should leave three open dates with the judge in question, and the trial may be reset in his absence. It shall, however, be the attorney's duty to appear personally as soon as possible before the judge who reset the case to confirm the reset date.

(3) Attorneys are obliged to take action immediately upon becoming aware of any conflict and specifically to call the conflicting engagements to the attention of the judge being asked to yield, and to pursue the matter until the conflict is resolved. Such matters may be presented to the judge in open court as a preliminary matter, with advance notice to other counsel.

(4) If counsel cannot avoid being unexpectedly late for or absent from any scheduled appearance before any judge, they shall in

advance of the scheduled appearance personally inform the judge of that fact, the reason therefor, and the nature and duration of the conflicting engagements.

(5) If an attorney has a felony case set for trial in any court on a given day, he shall not schedule any other case for trial on that day or for any day thereafter during which that felony trial may reasonably be expected to continue. If an attorney has a misdemeanor case set for jury trial on a given date, he shall not schedule more than one other misdemeanor case for trial on that day. These restrictions will not apply to cases as to which an attorney is certain there will be a nontrial disposition.

(6) This court will take appropriate disciplinary action when an attorney fails to conduct himself in accordance with the requirements and obligations imposed by this Rule.

D.C. Superior Court Criminal Rule 57 refers to the above Rule without repeating it and makes it applicable to criminal cases.

Supreme Court, U. S.
FILED
JUN 10 1977
MICHAEL RODAK, JR., CLERK

No. 76-1254

In the Supreme Court of the United States

OCTOBER TERM, 1976

IN THE MATTER OF GAILLARD T. HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

T. GEORGE GILINSKY,
ANN T. WALLACE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1254

IN THE MATTER OF GAILLARD T. HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-20) is reported at 367 A. 2d 155.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1976. A petition for rehearing was denied on February 9, 1977 (Pet. App. 22). The petition for a writ of certiorari was filed on March 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the trial court erred in using the summary contempt procedures of D.C. Superior Court Criminal Rule 42(a) in fining petitioner $10 for being late to court.

2. Whether the evidence supported the court's finding of contempt of court.

STATEMENT

The relevant facts are not in dispute and are set forth in the opinion of the court of appeals (Pet. App. 16-17). On Friday, October 17, 1975, Judge Hess of the District of Columbia Superior Court admonished all participants in a criminal trial, including petitioner, the defense counsel, to appear in court promptly at 10:00 a.m. the following Monday. Petitioner appeared in court the following Monday at 10:07 or 10:08. When Judge Hess asked him to explain his tardiness, petitioner acknowledged that he was aware of the court's admonition to appear promptly, stated that he had made "herculean efforts to get here at ten o'clock" and asked whether the court wanted to hear his full explanation (Pet. App. 4). The court responded, "Yes, I do. Otherwise I will hold you in contempt" (*ibid.*). Petitioner then proferred a lengthy explanation to the effect that he had arrived at the courthouse at 8:45 a.m., had appeared before another judge for the purpose of postponing a motion, and had appeared at the preliminary hearing court at 9:45 a.m. to advise co-counsel in another case to proceed with a preliminary hearing without him. As soon as he found co-counsel, he proceeded directly to Judge Hess's courtroom (Pet. App. 4-6). Petitioner ascribed primary blame to the inefficient scheduling procedures of the Preliminary Hearing Court (*ibid.*). Judge Hess responded that under the court's rules trial matters take precedence over all non-trial matters,[1] that petitioner had had ample time to notify the clerk that he

[1]Super. Ct. Civ. R. 104(b)(3) provides: "Nontrial matters in a trial court will yield to trials in any court." This rule applies to criminal as well as civil proceedings. See Super. Ct. Crim. R. 57(a) (Pet. App. 16, n. 1).

would be late, and that therefore his absence was willful (Pet. App. 6).

Judge Hess summarily found petitioner in contempt under Rule 42(a) of the Superior Court Rules of Criminal Procedure and ordered him to pay a $10 fine. The court then issued an Order of Contempt reciting the facts and the basis for the finding (Pet. App. 7). Petitioner paid the fine and subsequently filed a motion for reconsideration to which he attached an affidavit restating the reasons for his tardiness and alleging, *inter alia*, that he had no intention of being late, that his subsequent investigation disclosed that the clock in the Preliminary Hearing Court was one minute behind the clock in Judge Hess' courtroom, and that he did not understand that a contempt citation was being considered when he gave his in-court explanation (Pet. App. 9-13). The court denied the motion, stating that petitioner had deliberately ignored the court's directive to appear and had violated Rule 104 (b)(3) by determining his own "order of priorities" (Pet. App. 14). The District of Columbia Court of Appeals affirmed (Pet. App. 15-20).

ARGUMENT

1. Petitioner argues primarily that the court erred in utilizing summary proceedings in finding him in contempt, because, he contends, an attorney's failure to appear on time is not conduct "committed in the actual presence of the court" within the meaning of Rule 42(a) of the Superior Court Criminal Rules (Pet. 7-12). Although petitioner relies on a number of federal appellate decisions interpreting Fed. R. Crim. P. 42(a) (Pet. 7-8), the District of Columbia Court of Appeals has rejected the contention in this and other cases interpreting Rule 42(a) of the Superior Court Criminal Rules. See *In re Rosen*, 315 A. 2d 151, certiorari denied,

419 U.S. 964; *In re Nesbitt*, 313 A. 2d 576, 578.[2] Those decisions constitute an authoritative interpretation of a local rule of procedure, and accordingly, there is no conflict that warrants this Court's review. Cf. *Pernell* v. *Southall Realty*, 416 U.S. 363, 368-369.

In any event, the particular circumstances of this case justified the use of the summary procedures of either the federal or the local Rule 42(a) rather than the notice and hearing procedures of Rule 42(b). While the purpose of the notice and hearing provisions of Rule 42(b) is "to inform the court of events not within its own knowledge" (*Sacher* v. *United States*, 343 U.S. 1, 9), all of the relevant facts in this case were within the personal knowledge of the court. The court knew that it had specifically admonished petitioner to appear on time, and that petitioner did not appear on time and did not notify the court he would be late. The court gave petitioner a full opportunity to explain his tardiness before finding him in contempt. Petitioner's affidavit filed in support of his motion for reconsideration does not add

[2]When petitioner stated (Pet. 7) that "[e]very circuit considering the question has agreed that a lawyer's tardiness is not conduct in 'the actual presence of the court' which may be punished summarily under Rule 42(a)," he apparently overlooked cases in the United States Court of Appeals for the District of Columbia Circuit. *In re Gates*, 478 F. 2d 998; *In re Niblack*, 476 F. 2d 930, certiorari denied, 414 U.S. 909, where the court held squarely that an attorney's tardiness may be summarily punished under Fed. R. Crim. P. 42(a).

materially to that explanation, and indeed the facts on which the court's finding was based are not in dispute.[3]

In those circumstances the formal notice and hearing provided for by Rule 42(b) would have served no purpose. Most of the cases cited by petitioner are not to the contrary. In *Jessup* v. *Clark*, 490 F. 2d 1068 (C.A. 3), *United States* v. *Delahanty*, 488 F. 2d 396 (C.A. 6), and *In re Lamson*, 468 F. 2d 551 (C.A. 1), the attorneys alleged facts which, if true, would have demonstrated that their failure to appear resulted from unforeseeable circumstances beyond their control—that is, circumstances that would have been a defense to, or in mitigation of, a charge of contempt. Petitioner, on the other hand, alleged no facts in defense or mitigation that would have required an evidentiary hearing to establish. The essence of his excuse was that he felt obliged to wait in the Preliminary Hearing Court until he could contact co-counsel in another case, notwithstanding a local rule that specifically provides that non-trial matters must yield to trial matters. In these circumstances, the observation of the court in *Jessup* v. *Clark*, *supra*, 490 F. 2d at 1072, is pertinent:

> If the judge did see or hear everything essential to a finding of contempt, so that all of the relevant facts are within his personal knowledge, then the value

[3]While petitioner's affidavit asserted that he had no intention of being late, the same assertion was plainly implicit in his in-court explanation. The alleged one-minute disparity between the clocks in the two courtrooms (Pet. App. 11) does not explain the seven-minute delay, and indeed, the affidavit merely confirms that petitioner has no explanation for why he was late (*ibid.*). The affidavit's statements that petitioner was careful not to overload his calendar and that he had never been late to Judge Hess's court before (Pet. App. 9-10) are not defenses to the charge but rather relate to the court's discretion in imposing sanctions.

> of a plenary hearing is minimal and, in a proper setting, is outweighed by the "need for immediate penal vindication." [Quoting from *Cooke* v. *United States*, 267 U.S. 517, 536.]

See also *in re Gates*, 478 F. 2d 998 (C.A. D.C.), *In re Niblack*, 476 F. 2d 930 (C.A. D.C.), certiorari denied, 414 U.S. 909.

Finally, even if summary proceedings were not available for dealing with attorney tardiness, the proceedings here may be properly regarded as satisfying the requirement of Rule 42(b), since petitioner was notified of the essential facts constituting the charge and given a reasonable opportunity under the circumstances to prepare a defense. See *In re Allis*, 531 F. 2d 1391, 1393 (C.A. 9), certiorari denied, 429 U.S. 900, where the court held that the requirements of Fed. R. Crim. P. 42(b) were satisifed when, as here, "[t]he facts were clear and undisputed. At no time was an indication given of the availability of other witnesses or evidence to support a defense of justification or excuse."[4]

2. Petitioner errs in contending (Pet. 14-17) that the evidence did not support the finding of contempt. Although petitioner alleges that he did not intend to be late, the evidence before the trial court, including particularly petitioner's own explanation, demonstrated that his lateness was the result, not of circumstances beyond his control or ability to foresee, but of his

[4]In view of the fact that petitioner was notified of the charge against him, was fully aware of the nature of the charge (his failure to appear on time), and was given a reasonable opportunity to be heard, there is no basis for petitioner's further contention that the proceeding denied him due process of law (Pet. 12-14).

voluntary choice between what he perceived to be conflicting obligations.[5] In view of Rule 104(b)(3) of the Superior Court Rules, which specifically assigns priority to trial matters, his choice satisfied the definition of contempt that petitioner himself sets forth (Pet. 14)—that is, "some departure from the contemnor's proper role in court proceedings, which * * * delays or frustrates the court's business." See *United States* v. *Seale*, 461 F. 2d 345 (C.A. 7). In short, the court of appeals correctly held (Pet. App. 19):

> The trial court properly inferred from appellant's actions and his explanation that he had deliberately and willfully substituted his own judgment for a direct order of the court even though his actions represented a good faith attempt to straighten out his conflicting obligations with two other courts.

Although we agree with petitioner that his conduct did not constitute a "serious crime" (Pet. 9, n. 3)—and neither the finding of contempt nor the opinion of the

[5]Indeed, petitioner's in-court explanation to Judge Hess (Pet. App. 3-6) reflects that he was fully familiar with the scheduling problems of the Preliminary Hearing Court. While it may be assumed that petitioner hoped to satisfy both obligations, the fact is not contrary to the conclusion of the courts below that his decision to remain in the Preliminary Hearing Court and run the foreseeable risk of being late to the trial court was a voluntary act.

Nor is there any basis for petitioner's assertion (Pet. 13-14) that the court of appeals' characterization of his conduct as "lingering at the preliminary hearing court" (Pet. App. 19) substituted a different offense from the one charged and found by the trial court. That characterization merely reflected the trial court's finding that petitioner's remaining in the preliminary hearing court was a voluntary act.

court of appeals suggests otherwise[6]—it did constitute a knowing infraction of a court order and rule of court. Trial courts must have wide discretion to deal with such infractions, and the relatively modest sanction imposed in this case, a ten dollar fine, was not an impermissible response. See *In re Gates, supra,* 478 F. 2d at 1000, n. 3.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

T. GEORGE GILINSKY,
ANN T. WALLACE,
Attorneys.

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[6]While we find quite understandable petitioner's concern about the contempt citation, the opinion of the court of appeals makes clear that the contempt citation does not reflect upon petitioner's good faith or professionalism (Pet. App. 19).